Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

GILBERTO BARRIOS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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26 pp

QUESTIONS PRESENTED

I.

WHETHER THE PANEL DECISION DIRECTLY CONFLICTS WITH THE DECISION OF THE UNITED STATES SUPREME COURT IN *APPRENDI V. NEW JERSEY*, 120 S.CT. 2348 (JUNE 26, 2000), AND OTHER CIRCUIT COURT DECISIONS, IN VIOLATION OF THE FIFTH AMENDMENT INDICTMENT AND DUE PROCESS CLAUSES, AS WELL AS THE SIXTH AMENDMENT NOTICE AND JURY TRIAL CLAUSES, SINCE THE INDICTMENT DID NOT CHARGE AN AMOUNT OF COCAINE, THE JURY WAS NOT INSTRUCTED AS SUCH, AND THE JURY MADE NO DETERMINATION REGARDING THIS ESSENTIAL ELEMENT OF THE OFFENSES CHARGED?

II.

WHETHER THERE IS A DIRECT CONFLICT BETWEEN THE CIRCUITS WHERE A *PER SE* REVIEW STANDARD IS BEING USED IN APPLYING THIS COURT'S DECISION IN *APPRENDI* WHERE THE DEFENDANT'S SENTENCE EXCEEDS THE STATUTORY MAXIMUM SENTENCE OF TWENTY (20) YEARS UNDER 21 U.S.C. SEC. 841(b)(1), AND THE ELEVENTH CIRCUIT HAS HELD THAT "PLAIN ERROR" REVIEW APPLIES TO *APPRENDI* ERROR, BUT, EVEN UNDER THE PLAIN ERROR REVIEW, CIRCUIT COURTS HAVE FOUND THAT A SENTENCE ABOVE THE STATUTORY MAXIMUM AFFECTS THE DEFENDANT'S SUBSTANTIAL RIGHTS?

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, GILBERTO BARRIOS, by and through his undersigned counsel, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit, entered in the proceedings on December 18, 2001, and petition for rehearing denied March 1, 2001.

OPINION OF THE COURT BELOW

The Court of Appeals for the Eleventh Circuit entered a non-published opinion, *United States v. Gilberto Barrios,* Case No. 99-10718-EE (11th Cir. December 18, 2000).

JURISDICTION

The judgment of the Court of Appeals affirming the judgment of the United States District Court was entered on December 18, 2000. A timely petition for rehearing was filed, and denied on March 1, 2001. This petition is timely filed pursuant to Rule 20, Rules of the Supreme Court, as amended. The jurisdiction of this Court is invoked pursuant to the provisions of Title 28, United States Code, Section 1254(1).

CONSTITUTIONAL PROVISIONS

U.S. CONST. AMEND. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person . . . be deprived of life, liberty, or property, without due process of law; . . .

U.S. CONST. AMEND. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation;. . . .

STATEMENT OF THE CASE

The Petitioner, Gilberto Barrios, was granted leave by the Court of Appeals during the appeals proceedings, to file a supplemental brief raising the issue of his illegal sentence, pursuant to *Apprendi v. New Jersey*, 120 S.Ct. 2348 (June 26, 2000). The *Apprendi* case was decided by this Court subsequent to the Appellant filing his initial brief but during the briefing period, and well prior to the Court's decision.

In the Court of Appeals decision, the Court refers to "Appellants' " in the conjunctive when addressing the

Apprendi claim raised. The Appeals Court, relying on a "plain error" standard of review, concluded that Barrios was not entitled to relief, since his substantial rights were not affected by the imposed sentence. (Op. at p.10). The Appeals Court reached this conclusion relying solely on the factual assertions set forth by the Probation Officer in the Presentence Report, and adopted by the sentencing Judge. (Op. at p. 9) No specific factual findings were made by the sentencing Judge. Notably, the Court of Appeals could not make any reference to trial evidence or any finding by the jury as to Barrios regarding the amount of cocaine he allegedly conspired to possess and possessed with the intent to distribute, since it did not exist.

The Indictment filed in this case did not include the essential element of the amount of cocaine involved in the crimes charged of conspiracy to possess and possession with the intent to distribute. (R1.118) Moreover, the jury was never instructed on this essential element of the offenses charged. (TR.11:2381-2388) In fact, the jury was only instructed that they would have to find that Barrios conspired to possess and possessed with the intent to distribute *"a detectable amount of cocaine."* The Court of Appeals affirmed Barrios' conviction and sentence of 324 months imprisonment.

REASONS FOR GRANTING THE PETITION

I.

THE PANEL DECISION DIRECTLY CONFLICTS WITH THE DECISION OF THE UNITED STATES SUPREME COURT IN *APPRENDI V. NEW JERSEY*, 120 S.CT. 2348 (JUNE 26, 2000), AND OTHER CIRCUIT COURTS, SINCE THE SENTENCE IMPOSED OF 324 MONTHS IMPRISONMENT VIOLATES THE FIFTH AMENDMENT INDICTMENT AND DUE PROCESS CLAUSES, AS WELL AS THE SIXTH AMENDMENT NOTICE AND JURY TRIAL CLAUSES, WHERE THE INDICTMENT DID NOT CHARGE AN AMOUNT OF COCAINE, THE JURY WAS NOT INSTRUCTED AS SUCH, AND THE JURY MADE NO DETERMINATION REGARDING THIS ESSENTIAL ELEMENT OF THE OFFENSES CHARGED

In *Apprendi v. New Jersey*, 120 S.Ct. 2348 (June 26, 2000), this Court established a rule of constitutional law of general applicability, mandated by the Due Process Clause of the Fifth Amendment and by the notice and jury trial guarantees of the Sixth Amendment: "[A]ny fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Id.* at 43, *quoting Jones v. United States*, 526 U.S. 227, 243 n.6 (1999).

In a subsequent Federal decision addressing *Apprendi*, *United States v. Henderson*, ___ F.Supp.___, Crim. No. 2:99-00214-01 (S.D.W.Va. July 19, 2000), the court concluded that "[a]lthough arising in the context of a state hate crime statute, this Court finds that the sweeping pronouncements in *Apprendi* apply with equal force to

federal narcotics prosecutions under 21 U.S.C. sec. 841." *Id.* at 20. Ruling that the drug enhancement provisions are inapplicable at sentencing where no amount of drugs is alleged in the indictment and such element has not been presented to a jury, the court held that "[c]asting aside the artificial formalism and looking at the real effect of a drug amount finding, 21 U.S.C. sec. 841 sets forth separate offenses, rather than one offense with different penalties." *Id.* Thus, in a prosecution under 21 U.S.C. sec. 841, *et seq.*, "the government must, in order to seek increased statutory penalties, allege the drug amount in the indictment, submit that fact to the jury, and prove the existence of the fact beyond a reasonable doubt." *Id.* at 23. *see also United States v. Rogers*, 228 F.3d 1318 (11th Cir. 2000) (Eleventh Circuit follows Supreme Court in *Apprendi*, vacating and remanding Defendant's sentence for resentencing without reference to drug quantity, since drug quantity in sections 841(b)(1)(A) and (B) must be charged in indictment and proven to jury beyond a reasonable doubt.)

It was vigorously argued in the Supplemental brief filed by Barrios that his sentence of 324 months imprisonment is unconstitutional under the *Apprendi* decision. He was convicted of drug offenses in violation of 21 U.S.C. sec. 841(a)(1). The violations for which Barrios was convicted authorize a maximum of up to a life sentence *only if he possessed, conspired to possess, or distributed "5 kilograms or more" of cocaine.* 21 U.S.C. sec. 841(b)(1)(A)(ii). ***For smaller quantities of cocaine, the maximum statutory punishment is a 20-year sentence. see* 21 U.S.C. sec. 841(b)(1).**

The Indictment in this case only charged Appellant Barrios with the drug offenses involving "a detectable amount" of cocaine. The case proceeded to trial. The jury was not instructed on any specific amount of cocaine, and, in fact, were only instructed to find that the offenses involved a "detectable amount of cocaine." Because the jury was never instructed on this essential element of the Title 841 offenses, the jury never found that this element of the narcotics offenses was proven beyond a reasonable doubt. The jury consequently did not find that Barrios possessed, distributed, or conspired to possess or distribute any *specific quantity* of cocaine. As a result, Barrios' 324 month sentence runs afoul of *Apprendi*, because the maximum sentence to which he was subject (and which was imposed at sentencing) increased from 20 years (240 months) to 27 years (324 months) based on the quantity of cocaine – a fact that the jury had no part in adjudicating. Moreover, Appellant argued that, according to the United States Supreme Court, the amount of drugs at issue in a case is an element of the offense, since it affects the sentence imposed, and must be proven by the government to the jury beyond a reasonable doubt, and which *must be specifically charged in the Indictment.* The Indictment in this case only charged Barrios with conspiring to possess with the intent to distribute a *detectable amount of cocaine*!

Notably, the Indictment in this case violated the Fifth Amendment to the United States Constitution, which provides: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." In *Apprendi*, this Court recognized that the four corners of the indictment constrain

the sentencing jurisdiction of the district court. 120 S.Ct. at 2359 n.10 ("The judge's role in sentencing is constrained at its outer limits by the facts alleged in the indictment.") And, both this Court and the Eleventh Circuit have consistently held that a violation of the Fifth Amendment indictment clause is jurisdictional, and is reversible *per se* without proof of prejudice. *Stirone v. United States*, 361 U.S. 212 (1960); *United States v. Gayle*, 967 F.2d 483, 485 (11th Cir. 1992) (*en banc*).

Moreover, the Eleventh Circuit Court has reaffirmed the principle that jurisdictional defects are "unwaivable," noticeable by the Court at any time, and not subject to "prejudice" analysis. *See Harris v. United States*, 149 F.3d 1304, 1308-1309 (11th Cir. 1998). Thus, the Fifth Amendment violation is *per se* reversible, and requires a new sentencing hearing.

Further, both the Fifth Amendment Due Process Clause and the Sixth Amendment right to trial by jury clause together "entitle a criminal defendant to a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." *Apprendi* at 2356 (citations omitted). The indictment must set forth all of the elements of the offense and "fairly inform [ ] a defendant of the charge against which he must defend" at trial. *Hamling v. United States*, 418 U.S. 87, 117-118 (1974). In the case at bar, the indictment did not include any reference to a drug quantity, or to any enhanced offense under section 841(b). In our case, with notice of the drug quantity element, and an appropriate jury instruction as to quantity, the trial result could well have been affected.

Under the unique facts of this case, a new trial would be the most appropriate remedy for the failure to provide Barrios with Sixth Amendment "notice" of the charge, and the failure to instruct his jury as to the drug quantity. *See e.g. United States v. Slaughter*, ___ F.3d ___, 2000 WL 1803643 at 3 (5th Cir. Dec. 8, 2000). In the alternative, certiorari review of this case should be granted, so that this Court may remedy these constitutional violations by remanding Barrios' case for resentencing within the statutory maximum set forth in section 841(b)(1)(C). *See United States v. Aguayo-Delgado*, 220 F.3d 926 (8th Cir. 2000) (quantity of drugs is element of Title 21 section 841 and 846 offenses, which must be charged in indictment and found by jury beyond a reasonable doubt); *United States v. Norby*, 225 F.3d 1053 (9th Cir. 2000) (Court addressed constitutional issues raised by *Apprendi*, and found error was plain, requiring vacatur of defendant's sentence).

Moreover, in light of recent decisions in this Court, vacating decisions in many federal drug cases, certiorari review should be granted, and this case remanded to the Court of Appeals for re-sentencing in light of the *Apprendi* rule. *See e.g.* ; *Dore v. United States*, No. 00-5296, 121 S.Ct. ___, 2001 WL 32470 (Jan. 16, 2001); *Griffiths v. United States*, No. 00-6515, 121 S.Ct. ___, 2001 WL 32471 (Jan. 16, 2001); *Potts v. United States*, 121 S.Ct. 559 (Nov. 27, 2000); *Phillips v. United States*, No. 00-6571, 121 S.Ct. ___, 2001 WL 32473 (Jan. 16, 2001); *Garcia v. United States*, No. 00-463, 121 S.Ct. ___, 2001 WL 12402 (Jan. 8, 2001); *Burns v. United States*, 121 S.Ct. 32 (2000); *Wims v. United States*, 121 S.Ct. 32 (2000); *Brown v. United States*, 121 S.Ct. 295 (2000). The above vacated decisions involve pre-*Apprendi* sentencing.

II.

THERE IS A DIRECT CONFLICT BETWEEN THE CIRCUITS WHERE A *PER SE* REVIEW STANDARD IS BEING USED IN APPLYING THIS COURT'S DECISION IN *APPRENDI* WHEN THE DEFENDANT'S SENTENCE EXCEEDS THE STATUTORY MAXIMUM SENTENCE OF TWENTY (20) YEARS UNDER 21 U.S.C. SEC. (b)(1), BUT THE ELEVENTH CIRCUIT HAS HELD THAT "PLAIN ERROR" REVIEW APPLIES TO *APPRENDI* ERROR, BUT, EVEN UNDER THE "PLAIN ERROR" REVIEW, A SENTENCE THAT EXCEEDS THE STATUTORY MAXIMUM AFFECTS THE DEFENDANT'S SUBSTANTIAL RIGHTS

The Petitioner suggests that the Eleventh Circuit is applying an incorrect "plain error" standard of review in addressing *Apprendi* claims. Several Circuits have determined that where there is *Apprendi* error, there must be *per se* reversal of the sentence. *See e.g. United States v. Tran*, 234 F.3d 798 (2d Cir. 2000); *United States v. Jackson*, 240 F.3d 1240 (10th Cir. 2001); *United States v. Angle*, 230 F.3d 113 (4th Cir. 2000), *vacated pending en banc review* (Jan. 17, 2001).

Assuming, *arguendo*, that the standard of review is "plain error", any sentence above the statutory maximum sentence affects the defendant's substantial rights, and, therefore, meets the standard for remand and re-sentencing. Several Circuit Courts applying the plain error review standard have found that any sentence above the statutory maximum meets the "affect on substantial rights" test, and, reversal and resentencing is required. *See e.g. United States v. Meshack*, 225 F.3d 556 (5th Cir. 2000) (post-*Apprendi* case, holding that plain error review

applies, but sentence above statutory maximum meets "affect on substantial rights" test); *United States v. Page*, 232 F.3d 536 (6th Cir. 2000) (same); *United States v. Norby*, 225 F.3d 1053 (9th Cir. 2000) (an error that results in longer sentence undoubtedly affects substantial rights).

The Petitioner respectfully suggests that, since his sentence of 324 months imprisonment clearly exceeds the statutory maximum sentence, there is *per se* error, mandating reversal and resentencing. However, even if this Court should align with those Circuit Courts applying a plain error review standard, Appellant's sentence, which exceeds the statutory maximum sentence, affects his substantial rights, and, therefore, the error is plain.

CONCLUSION

For the reasons stated, the Petitioner prays that this Court issue a Writ of Certiorari and consider the decision below.

Respectfully submitted,

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[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-10718
Non-Argument Calendar

D. C. Docket No. 95-00324-CR-LCN

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

GILBERTO BARRIOS,
JOSE ANTONIO PEREZ,

Defendants-Appellants.

Appeals from the United States District Court
for the Southern District of Florida

(Filed Dec. 18, 2000)

Before BIRCH, BLACK and BARKETT, Circuit Judges.

PER CURIAM:

Appellants Gilberto Barrios and Jose Antonio Perez appeal their convictions for violations of 21 U.S.C. §§ 841(a)(1), 846, 952(a), and 963. Perez also appeals his sentence. Both Appellants argue the district court erred in (1) not dismissing the indictment for delay in indicting them and bringing them to trial, and (2) denying their motions for judgments of acquittal pursuant to Fed. R. Crim. P. 29. Perez challenges his sentence, claiming (3)

the court erred in denying 2-level reductions for acceptance of responsibility, U.S. Sentencing Guidelines Manual § 3E1.1, playing a minor role, *id.* § 3B1.2, and fulfilling the "safety valve" requirements, *id.* § 2D1.1(b)(6). Perez also claims (4) under *Apprendi v. New Jersey*, ___ U.S. ___, 120 S. Ct. 2348 (2000), the sentence of 262 months' imprisonment should be vacated and a sentence of 240 months or less should be imposed pursuant to 21 U.S.C. § 841(b)(1)(C). Barrios challenges (5) the admission of drug ledgers, testimony identifying drug ledger entries, hearsay, and evidence of bad acts under Fed. R. Evid. 404(b), as well as the exclusion of evidence bolstering the credibility of the Government's case. Barrios also contends (6) the district court erred in not granting a new trial due to the Government's alleged improper vouching for its witnesses and alleged misconduct in closing arguments. We discuss only the first four issues.[1]

With respect to the first issue, a mixed question of law and fact, we review the questions of law de novo, and the findings of fact under the clearly erroneous standard. *See United States v. Clark*, 83 F.3d 1350, 1352 (11th Cir. 1996). Barrios, prior to trial, filed a motion to dismiss the indictment for pre- and post-indictment delay. Perez did not file a motion and did not join Barrios' motion. Perez expressed an interest in joining the motion only after testimony had begun. Since Perez did not raise this objection to the indictment prior to trial, his objection is deemed waived. *See* Fed. R. Crim. P. 12(b)(2). *See also United States v. Lerma*, 657 F.2d 786, 789-90 (5th Cir. Unit A

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[1] We affirm the remaining issues on appeal pursuant to 11th Cir. R. 36-1.

Sept. 1981) (citing *United States v. Freeman*, 619 F.2d 1112, 1118 (5th Cir. 1980)). Furthermore, since Barrios does not raise the issue of pre-indictment delay on appeal, we consider it abandoned. *See United Staes v. Cunningham*, 161 F.2d 1343, 1344 (11th Cir. 1998).

As to the post-indictment delay alleged by Barrios, there are four factors to consider: (1) the length of the delay; (2) the reasons for the delay; (3) the defendant's assertion of the right; and (4) the prejudice to the defendant. See *United States v. Register*, 182 F.3d 820, 827 (11th Cir. 1999) (citing *Barker v. Wingo*, 407 U.S. 514, 530-32, 92 S. Ct. 2182, 2192-93 (1972)). Barrios satisfies the first prong, as 30 months passed from Barrios' arrest until the start of the trial. *See Doggett v. United States*, 505 U.S. 647, 652, n. 1, 112 S. Ct. 2686, 2691, n. 1 (1992) (post-indictment delay of at least one year is generally considered prejudicial).

That the delay in government action has not been shown to stem from bad faith or dilatory government action, however, cuts strongly against Barrios's position. *See United States v. Schlei*, 122 F.3d 944, 987 (11th Cir. 1997). Since at least one of the factors cuts against Barrios's position, Barrios must show actual prejudice. *See United States v. Davenport*, 935 F.2d 1233, 1239 (11th Cir. 1991). Barrios's arguments that he has suffered prejudice as a result of the fading memories of his potential alibi witnesses is not sufficient for Barrios to meet his burden. *United States v. Avalos*, 541 F.2d 1100, 1116 (11th Cir. 1976). We therefore hold the district court did not err in dismissing Barrios' motion to dismiss the indictment for post-indictment delay.

With respect to the motions for judgment of acquittal, we review de novo, making all reasonable inferences and credibility determinations in favor of the jury's verdict. *See United States v. Gamboa*, 166 F.3d 1327, 1331 (11th Cir. 1999); *United States v. Ramsdale*, 61 F.3d 825, 828 (11th Cir. 1995). We cannot reverse a conviction for insufficiency of evidence unless "no reasonable jury could find proof of guilt beyond a reasonable doubt." *United States v. Jones*, 913 F.2d 1552, 1557 (11th Cir. 1990).

The Government satisfied the elements to establish Appellants conspired to import and distribute drugs: (1) a conspiracy to import and distribute drugs existed, (2) Appellants had knowledge of it, and (3) Appellants voluntarily became a part of the conspiracy. *United States v. Bascaro*, 742 F.2d 1335, 1359 (11th Cir. 1984).

(1) The Government proved the existence of the large-scale, bi-coastal Falcon/Magluta drug conspiracy; the Government's use of circumstantial evidence and inferences from co-conspirators' actions was permissible. *United States v. Obregon*, 893 F.2d 1307, 1311 (11th Cir. 1990). (2) Appellants' actions evince their knowledge that the drugs were imported and would be distributed. The Government showed at trial that Perez was repeatedly present at the scene of large-scale cocaine deliveries in California, and he patrolled the gate where the cocaine was picked up for delivery. The Government also showed Barrios participated extensively in the cross-country transport of massive quantities of cocaine by arranging for its pick-up, delivery, and storage, and for cash payments to suppliers. We have held similar factors, such as the massive quantity of drugs, the frequency of interaction with co-conspirators, and presence at "stash houses,"

are sufficient to find knowledge of drug importation. *Bascaro*, 742 F.2d at 1359-60. This evidence also easily shows knowledge that the cocaine would be distributed. (3) There is not showing that Appellants acted involuntarily. In establishing these three prongs, the Government has satisfied its burden to "come forward with slight evidence to connect a particular defendant to the conspiracy[]" to import and distribute cocaine. *United States v. Calderon*, 127 F.3d 1314, 1326 (11th Cir. 1997).

The Government also satisfied the elements to establish Barrios possessed cocaine with intent to distribute: (1) knowledge, (2) possession, and (3) intent to distribute. *Gamboa*, 166 F.3d at 1331. In orchestrating co-conspirators for the pick-up, delivery, and storage of cocaine, Barrios exhibited the requisite knowledge and intent to distribute. These actions also show Barrios' dominion and control over the drugs. Such constructive possession is sufficient to satisfy the possession element. *Id.* We thus hold the district court did not err in denying Appellants' respective motions for judgment of acquittal.

We review Perez's criminal history categorization and the denial of sentencing reductions as factual determinations that must be affirmed unless clearly erroneous. *United States v. Hromada*, 49 F.3d 685, 688-89 (11th Cir. 1995). We affirm the district court's denial of the reduction for acceptance of responsibility, U.S. Sentencing Guidelines Manual § 3E1.1 (1999), based on its determination that Perez had not "unequivocally" accepted responsibility for his crimes. According to the probation officer, Perez, in his statement, "fails to discuss his role or conduct in the instant offense . . . [and] makes a general and overly broad statement of acceptance of responsibility."

Presentence Investigation Report, Addendum at 2. See *id.* ¶ 29 for Perez's statement. Further, the Government's failure to offer Perez a plea agreement that was favorable to him did not preclude his pleading guilty. While "[c]onviction by trial does not automatically preclude a defendant from consideration" for an acceptance of responsibility reduction, only the "rare" defendant who proceeds to trial may benefit from this reduction. U.S. Sentencing Guidelines Manual § 3E1.1, cmt. n.2. One example of this rare circumstance is when a defendant goes to trial to preserve issues not related to factual guilt, such as constitutional or statutory challenges. *Id.* This type of circumstance does not apply here. *See also United States v. Gonzales*, 70 F.3d 1236, 1239 (11th Cir. 1995).

As to the district court's denying the "safety valve" limitation and accepting criminal history category II for Perez, U.S. Sentencing Guidelines Manual §§ 5C1.2, 4A1.1(a), Perez concedes he was indicted in case number 97-882-CR-Ungaro-Benages prior to going to trial in the instant case. He further concedes he negotiated a plea for 135 months' imprisonment in the former case, in which he was considered to be a first-time offender. Perez argues he should have been permitted to plead concurrently in the two cases. He then would not have accrued the three criminal history points and would have been eligible for the "safety valve," which is available only to those with no more than one criminal history point. We find no clear error in the district court's sentencing Perez based on a prior conviction and without the opportunity to plead concurrently in the two cases. *See, e.g., United States v. Rice*, 43 F.3d 601, 606 (11th Cir. 1995). The imposition of Appellant's concurrent sentences does not create

the presumption that the underlying convictions are related. *See id.* at 607. The district court thus did not clearly err in allotting Appellant three criminal history points and criminal history category II and denying him the "safety valve" limitation. *See* Presentence Investigation Report ¶ 41; U.S. Sentencing Guidelines Manual, Ch. 5, Pt. A; *id.* § 5C1.2(1).

We also affirm the district court's denial of a sentencing reduction based on Perez's playing a minor role in the crime. *Id.* § 3B1.2. We agree with the district court that Perez played a large and crucial role in receiving the cocaine and providing access to locked areas for drug and cash deliveries. We note Perez was more responsible than the truck drivers and the stash house operators. *See* Presentence Investigation Report, Addendum at 2-3.

Finally, we hold the district court did not commit plain error under *Apprendi v. New Jersey*, ___ U.S. ___, 120 S. Ct. 2348 (2000), in sentencing Perez to 262 months' imprisonment and five years' supervised release and sentencing Barrios to 324 months' imprisonment and five years' supervised release.[2] Since the issues of the absence of drug quantity in the indictment and the district court's failure to submit the question of drug quantity to the jury were not raised at trial, we use the plain error standard on review. "Before an appellate court can correct an error

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[2] This analysis encompasses only the charge against Appellants of conspiring to possess with intent to distribute cocaine, 21 U.S.C. §§ 841(a)(1), 846, and the charge against Barrios of possessing with intent to distribute cocaine. *Id.* §§ 952(a), 963, lacks a statutory sentencing maximum and thus falls outside the purview of *Apprendi*.

not raised at trial, there must be (1) error, (2) that is plain, and (3) that affect[s] substantial rights. . . . If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *United States v. Swatzie*, 228 F.3d 1278, 1281 (11th Cir. 2000) (quoting *Johnson v. United States*, 520 U.S. 461, 466-67, 117 S. Ct. 1544, 1548-49 (1997)).

We assume arguendo Appellants' sentences were imposed in error and these errors were plain. *See id.* at 1282. We then turn to whether Appellants' substantial rights were affected by these errors. A drug quantity of at least 150 kilograms was apparently uncontroverted by Perez, both at trial and at sentencing. Barrios apparently delivered 12-15 shipments of cocaine, ranging from 800-1200 kilograms, to a co-conspirator. *See* Presentence Investigation Report ¶ 23. We find there is no evidentiary basis for the jury reasonably to have found that Appellants committed the charged crimes without also finding Appellants were responsible for at least 5 kilograms of cocaine, as required by 21 U.S.C. § 841(b)(1)(A)(ii)(II). *See Swatzie*, 228 F.3d at 1283. *See also* Presentence Investigation Report ¶ 72. As long as the jury found Appellants responsible for at least 5 kilograms of cocaine, Appellants' substantial rights were not affected by the imposed sentences. *See Swatzie*, 228 F.3d at 1283. On this basis, we hold these sentences are not reversible under the plaint error standard.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-10718-EE

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

GILBERTO BARRIOS,
JOSE ANTONIO PEREZ,

Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of Florida

(Filed Mar. 1, 2001)

BEFORE: BIRCH, BLACK and BARKETT, Circuit Judges

PER CURIAM:

The petition(s) for rehearing filed by Appellant, Gilberto Barrios, is DENIED.

ENTERED FOR THE COURT:

/s/ Susan Black
UNITED STATES CIRCUIT JUDGE

Supreme Court, U.S.
FILED
JUL 30 2001
OFFICE OF THE CLERK

(2)

No. 00-1787

In the Supreme Court of the United States

GILBERTO BARRIOS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court committed reversible error by sentencing petitioner to 324 months' imprisonment for drug offenses, where the quantity of drugs involved in those offenses was not charged in the indictment or found by the jury beyond a reasonable doubt.

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In the Supreme Court of the United States

No. 00-1787

GILBERTO BARRIOS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-8) is unpublished, but the decision is noted at 245 F.3d 793 (Table).

JURISDICTION

The judgment of the court of appeals was entered on December 18, 2000. A petition for rehearing was denied on March 1, 2001 (Pet. App. 9). The petition for a writ of certiorari was filed on May 30, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of conspiring to possess cocaine with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1)

and 846 (Count I); conspiring to import cocaine, in violation of 21 U.S.C. 952(a) and 963, and 18 U.S.C. 2 (Count II); and possessing cocaine with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2 (Count IV). He was sentenced to concurrent terms of 324 months' imprisonment, to be followed by five years' supervised release, and fined $15,000. Gov't C.A. Br. 1-2. The court of appeals affirmed. Pet. App. 1-8.

1. Petitioner was involved in the trucking business. From at least 1989 to 1991, he transported, or arranged for others to transport, large quantities of cocaine on behalf of the Miami-based Falcon/Mugluta cocaine distribution organization. Gov't C.A. Br. 3-30.

During an October 1991 search of a drug stash house, David Borah, a special agent of the Drug Enforcement Administration, obtained a drug ledger for the year 1990, which contained numerous entries referring to "Besi," petitioner's code name. An entry for December 19, 1990, for example, referred to "Besi" and 1,539 kilograms of cocaine. In January 1992, Agent Borah searched a second stash house, which was owned by co-conspirator Sergio Crego, and discovered 3,093 kilograms of cocaine hidden in the attic. Gov't C.A. Br. 5, 7-8; R5:428-429.[1]

2. A federal grand jury returned a superseding indictment charging petitioner and four co-defendants with various cocaine-trafficking offenses. The indictment did not allege the quantities of cocaine involved in those offenses. Gov't C.A. Br. 1; C.A. R.E. Def. Exh. 110 (Indictment).

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[1] That seizure resulted in Count IV of the superseding indictment against petitioner.

At trial, the government introduced evidence establishing, among other things, that petitioner paid various individuals to transport cocaine. In 1989, for example, petitioner paid Alexis de la Nuez approximately $450,000 to arrange for the transportation of two loads of cocaine—totaling 350 kilograms and 500 kilograms, respectively—from Miami to New Jersey; during that same period, petitioner also paid Jorge Diaz $90,000 to transport 300 kilograms of cocaine. Also in 1989, Pedro Rosello, a member of the Falcon/Mugluta organization, helped petitioner remove 50 to 60 boxes of cocaine from petitioner's semi-trailer; thereafter, between 1990 and 1991, petitioner entrusted between 10 and 12 shipments of cocaine to Rosello for delivery to a stash house. In 1991, petitioner paid Luis Pena $150,000 to transport approximately 800 kilograms of cocaine from California to New Jersey. Gov't C.A. Br. 15-16, 19-24, 33.

Petitioner testified on his own behalf. He denied that he had transported cocaine with other truck drivers, such as Pena, who had testified as government witnesses, although he acknowledged knowing these men through the trucking business. Gov't C.A. Br. 32-33.

At the end of trial, neither petitioner nor Jose Perez, the only co-defendant who stood trial, requested that the jury be instructed to find the quantity of cocaine involved in their offenses. The district court gave no such instruction.

The jury found petitioner guilty of the three offenses with which he was charged. Gov't C.A. Br. 2.

3. The Probation Office prepared a Presentence Investigation Report (PSR), which concluded that petitioner's offenses involved "in excess of 150 kilograms of cocaine." PSR para. 31. Petitioner did not challenge that finding at sentencing. See 4/6/99 Sent. Tr. 45

(defense counsel states that he has no factual or legal objections to the PSR). The district court, after concluding that petitioner's Sentencing Guidelines range was 324 to 405 months' imprisonment, sentenced him to concurrent terms of 324 months' imprisonment. *Id.* at 45-46.

4. Petitioner appealed, raising numerous challenges to his convictions, none of which is reasserted here. After petitioner's opening brief had been filed, this Court issued its decision in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000). Perez, petitioner's co-defendant, filed a supplemental brief arguing that his sentence was unconstitutional under *Apprendi* because the quantities of cocaine involved in his offenses were not alleged in the indictment or found by the jury. Perez Supp. C.A. Br. 3-8.[2]

The court of appeals affirmed in an unpublished per curiam opinion. Pet. App. 1-8. Although petitioner failed to file a supplemental brief addressing *Apprendi*, the court of appeals nonetheless considered whether his sentence should be reversed pursuant to that decision. *Id.* at 7-8. The court decided that question under the plain-error standard, because the defendants had not raised any *Apprendi*-type claim at trial. *Ibid.* The court "assume[d] arguendo" that petitioner's sentence was imposed in error and that the error was plain. *Id.* at 8. The court concluded, however, that any such error did not affect petitioner's "substantial rights," and thus

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[2] Petitioner attempted to file a supplemental brief addressing the *Apprendi* decision on January 8, 2001, more than two weeks after the court of appeals had issued its decision in this case (and more than six months after this Court issued its decision in *Apprendi*). The court of appeals did not accept petitioner's belated filing.

did not warrant reversal of his sentence under the plain-error standard. *Ibid.* The court, after noting the evidence that petitioner had "apparently delivered 12-15 shipments of cocaine, ranging from 800-1200 kilograms to a co-conspirator," concluded that "there is no evidentiary basis for the jury reasonably to have found that [petitioner] committed the charged crimes without also finding [he was] responsible for at least 5 kilograms of cocaine, as required by 21 U.S.C. § 841(b)(1)(A)(ii)(II)." *Ibid.*

ARGUMENT

Petitioner contends (Pet. 4-8) that his concurrent 324-month sentences should be vacated in light of this Court's decision in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), because the quantity of cocaine involved in his offenses was not alleged in the indictment or found by the jury beyond a reasonable doubt. In *Apprendi*, the Court held, as a matter of constitutional law, that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt." *Id.* at 490. The court of appeals' holding that petitioner's sentence, although erroneously imposed under *Apprendi*, is not reversible under the plain-error standard does not warrant further review.[3]

1. Petitioner's cocaine-trafficking offenses were subject to sentencing under the graduated penalties set forth in 21 U.S.C. 841(b) (Supp. V 1999) (conspiracy to

[3] Because the court of appeals has already considered the application of *Apprendi* to petitioner's sentence, this case is unlike those cited by petitioner (Pet. 8) in which the Court granted certiorari, vacated the judgment, and remanded for consideration in light of *Apprendi*.

possess and possession of controlled substances) and 21 U.S.C. 960(b) (Supp. V 1999) (importation of controlled substances).[4] Under those provisions, a defendant is subject to a maximum sentence of 40 years' imprisonment if his offense involves 500 grams or more of cocaine. See 21 U.S.C. 841(b)(1)(B), 960(b)(2) (Supp. V 1999). When a defendant is found guilty of a drug offense involving *any* detectable quantity of cocaine, Section 841(b)(1)(C) and Section 960(b)(3) authorize "a term of imprisonment of not more than 20 years." Consequently, petitioner's concurrent 27-year sentences each depended upon an increase in the statutory maximum sentence by virtue of a fact (*i.e.*, that the offense involved 500 grams or more of cocaine) that was not found by the jury to have been proved beyond a reasonable doubt. The imposition of a sentence above 20 years on each count on the basis of a drug-quantity determination made by the court was thus error under *Apprendi*.

2. Because petitioner did not raise his constitutional claim in the district court, however, that claim was subject to review only under the plain-error standard. See Fed. R. Crim. P. 52(b); *Johnson* v. *United States*, 520 U.S. 461, 466-467 (1997) (in order for an appellate court to correct an error that was not raised in the trial court, there must be (1) an error, (2) that is "plain," (3) that "affect[s] substantial rights," and (4) that "seriously affect[s] the fairness, integrity, or public reputa-

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[4] The court of appeals was thus mistaken in suggesting (Pet. App. 7 n.2) that petitioner's drug importation offense is not subject to "a statutory sentencing maximum and thus falls outside the purview of *Apprendi*." For the reasons explained in the text, the court's misunderstanding does not affect the appropriate outcome of the case.

tion of judicial proceedings"). As the court of appeals recognized, petitioner cannot satisfy that standard.

a. Petitioner asserts (Pet. 7) that indictment error, in violation of the Fifth Amendment, is "jurisdictional" and requires per se reversal. This Court has recognized, however, that "most constitutional errors can be harmless." *Neder* v. *United States*, 527 U.S. 1, 8 (1999). The Court has "found an error to be 'structural,' and thus subject to automatic reversal, only in a 'very limited class of cases,'" such as those involving a denial of counsel, a biased trial judge, or racial discrimination in jury selection. *Ibid.* (quoting *Johnson*, 520 U.S. at 468). In contrast to those errors that have been held to be "structural," the Court explained, a jury "instruction that omits an element of the offense does not *necessarily* render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *Id.* at 8-9. The omission of an element from an indictment, like the omission of an element from a jury instruction in *Neder*, does not necessarily render a criminal proceeding "fundamentally unfair" or "unreliable." It is thus not a circumstance in which automatic reversal is required. See *United States* v. *Prentiss*, No. 98-2040, 2001 WL 788648, at *9-*11 (10th Cir. July 12, 2001) (en banc); *United States* v. *Angle*, No. 96-4662, 2001 WL 732124, at *1-*2 (4th Cir. June 29, 2001) (en banc); *United States* v. *Nance*, 236 F.3d 820, 825 (7th Cir. 2000), petition for cert. pending (filed Apr. 24, 2001); *United States* v. *Mojica-Baez*, 229 F.3d 292, 309-311 (1st Cir. 2000), cert. denied, 121 S. Ct. 2215 (2001) (No. 00-1256).[5]

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[5] *Neder* did not cite *Stirone* v. *United States*, 361 U.S. 212 (1960), on which petitioner relies (Pet. 7), as a case involving "structural" error. *Stirone* was decided before the Court's compre-

Moreover, as this Court made clear in *Johnson*, 520 U.S. at 466, all claimed errors in federal criminal trials, regardless of their nature or seriousness, are subject to the plain-error rule set out in Rule 52(b) of the Federal Rules of Criminal Procedure when the defendant does not make a timely objection in the district court. "'No procedural principle is more familiar to this Court than that a constitutional right,' or a right of any other sort, 'may be forfeited in criminal as well as in civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.'" *United States* v. *Olano*, 507 U.S. 725, 731 (1993) (quoting *Yakus* v. *United States*, 321 U.S. 414, 444 (1944)). Even a conclusion that a particular type of error is "structural," or "so serious as to defy *harmless*-error analysis," suggests only that such error may always "affec[t] substantial rights," thus satisfying the third of the four requirements for plain-error relief. See *Johnson*, 520 U.S. at 469-469 (emphasis added). Under the fourth requirement, a prejudicial error (including a "structural" one) that would clearly be grounds for relief if it was properly preserved is *not* a proper ground for relief if it was *not* preserved, unless it also "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Id.* at 469-470 (quoting *Olano*, 507 U.S. at 736).

b. The district court's error in sentencing petitioner to 324 months' imprisonment does not require reversal under the plain-error standard. Petitioner cannot show that the error both "affect[ed] substantial rights" and

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hensive adoption of harmless-error analysis in *Chapman* v. *California*, 386 U.S. 18 (1967). *Chapman* and *Neder* cast considerable doubt on whether *Stirone* is consistent with the Court's current view concerning harmless error.

"seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings," *Johnson*, 520 U.S. at 467, for two independent reasons.

First, the *Apprendi* error was of no significance here because the evidence of drug quantity was essentially undisputed. The government's evidence at trial demonstrated that petitioner transported thousands of kilograms of cocaine on behalf of the Falcon/Mugluta organization.[6] Petitioner's defense did not center on the quantities of cocaine involved in his offenses. Instead, petitioner denied all involvement with the cocaine transportation scheme. Accordingly, in finding petitioner guilty of importing cocaine and possessing cocaine with the intent to distribute it, the jury *necessarily* found that petitioner was responsible for in excess of the 500 grams necessary to trigger a sentence of up to 40 years' imprisonment. See Pet. App. 8. Although petitioner now claims (Pet. 7) that "with notice of the drug quantity element, and an appropriate jury instruction as to quantity, the trial result could well have been affected," he fails to explain how the jury might rationally have concluded that he committed the three offenses described in the indictment without participating in an offense involving at least 500 grams of cocaine.[7] In those circumstances, the district court's

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[6] Petitioner asserts (Pet. 3) that the court of appeals "rel[ied] solely on the factual assertions set forth by the Probation Officer in the Presentence Report, and adopted by the sentencing Judge." The trial evidence, however, amply supported the quantity calculations contained in the PSR. See pp. 2-3, *supra*; Gov't C.A. Br. 3-30, 33-34.

[7] With respect to Count IV, the government introduced evidence that the quantity of cocaine seized at Sergio Crego's house was 3,093 kilograms. See p. 2, *supra*. Petitioner did not dispute that evidence at trial or at sentencing.

Apprendi error could not have "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings." *Johnson*, 520 U.S. at 470 (no relief from plain error where element of offense that was not submitted to jury was "essentially uncontroverted" and the evidence supporting it was "overwhelming"); see also, *e.g.*, *Nance*, 236 F.3d at 826 ("If this jury was going to convict [the defendant] at all—which it plainly did—there is simply no way on this record that it could have failed to find" that the offense involved the enhancing quantity of drugs.); *United States* v. *Keeling*, 235 F.3d 533, 539-540 (10th Cir. 2000), cert. denied, 121 S. Ct. 2575 (2001) (No. 00-10161).

Second, petitioner was convicted on three counts, each of which carries a permissible maximum sentence of 20 years' imprisonment in the absence of a jury finding with respect to drug quantity. See 21 U.S.C. 841(b)(1)(C), 960(b)(3) (Supp. V 1999). If petitioner had been sentenced to the maximum permissible term of imprisonment on each count, the district court would have had the statutory authority to impose consecutive, rather than concurrent, sentences on those counts. See 18 U.S.C. 3584. Indeed, the Sentencing Guidelines would have required the court to run petitioner's terms of imprisonment consecutively, in part, to arrive at a total term of imprisonment within the applicable sentencing range, which in petitioner's case was 324 to 405 months' imprisonment. Sentencing Guidelines § 5G1.2(d); see *United States* v. *Page*, 232 F.3d 536, 544 (6th Cir. 2000), certs. denied, 121 S. Ct. 1389, 121 S. Ct. 1965, and 121 S. Ct. 2202 (2001) (Nos. 00-8491, 00-7751, 00-8611 and 00-9401). Because petitioner could have been sentenced to the same 324-month term of imprisonment through the imposition of partially consecutive sentences on the three counts of conviction, the

Apprendi error in this case could neither affect substantial rights nor seriously affect the fairness, integrity, or public reputation of judicial proceedings. See *Page*, 232 F.3d at 544-545; accord *Angle*, 2001 WL 732124, at *3; *United States* v. *Kentz*, 251 F.3d 835, 842 (9th Cir. 2001); *United States* v. *Parolin*, 239 F.3d 922, 930 (7th Cir.), cert. denied, 121 S. Ct. 2538 (2001) (No. 00-9999); *United States* v. *Sturgis*, 238 F.3d 956, 960-961 (8th Cir. 2001), petition for cert. pending (filed June 19, 2001) (No. 00-10804); but see *United States* v. *Vasquez-Zamora*, 253 F.3d 211, 214 (5th Cir. 2001); *United States* v. *Bradford*, 246 F.3d 1107, 1114-1115 (8th Cir. 2001).[8]

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[8] Petitioner's sentence also includes a five-year term of supervised release. Section 841(b)(1)(C) and Section 960(b)(3) authorize a term of that length by providing that the term be "at least 3 years" for a defendant who, like petitioner, has been found guilty of a drug offense involving *any* detectable quantity of a Schedule II controlled substance. Although the quantity of drugs involved in petitioner's offenses could therefore affect the minimum term of supervised release to which he was subject under various provisions of Section 841(b) and Section 960(b), it could not affect the maximum. The majority of the circuits that have addressed the question agree that the provisions of Section 841(b) and Section 960(b) concerning supervised release, each of which uses the "at least" formulation, establish mandatory minimum terms of supervised release, with a maximum term of supervised release for life. See, *e.g.*, *United States* v. *Page*, 131 F.3d 1173, 1177-1180 (6th Cir. 1997) (citing cases adopting that view from the Second, Eighth, Ninth, and Tenth Circuits), cert. denied, 525 U.S. 828 (1998). Some circuits, however, have held that a term of supervised release under Section 841(b) or Section 960(b) cannot exceed the three-year or five-year maximum term authorized by 18 U.S.C. 3583(b). See *United States* v. *Barnes*, 244 F.3d 172, 178 (1st Cir. 2001); *United States* v. *Kelly*, 974 F.2d 22, 24-25 (5th Cir. 1992); see also *United States* v. *Velasco-Heredia*, 249 F.3d 963, 969 (9th Cir. 2001)

c. Petitioner argues (Pet. 9-10) that the court of appeals' application of plain-error review in this case conflicts with *United States* v. *Tran*, 234 F.3d 798 (2d Cir. 2000), and *United States* v. *Jackson*, 240 F.3d 1245, 1247-1249 (10th Cir. 2001), which held that the omission from an indictment of a fact affecting the statutory maximum sentence is automatically reversible. Any conflict with *Tran* would not warrant review at this time, however, because the Second Circuit is reconsidering en banc the reasoning of that decision. *United States* v. *Thomas*, 248 F.3d 76 (2d Cir. 2001) (ordering rehearing en banc in another case presenting the issue). Moreover, although the Tenth Circuit denied the government's petition for rehearing en banc in *Jackson*,

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(finding error in supervised-release term imposed under Section 841(b)(1)(D) that exceeded "statutory maximum" under Section 3583(b)(2)); *United States* v. *Meshack*, 225 F.3d 556, 578 (5th Cir. 2000) (remanding for reduction of supervised release terms under *Apprendi*), cert. denied, 121 S. Ct. 834, modified on reh'g, 244 F.3d 367 (5th Cir. 2001), petition for cert. pending (filed June 5, 2001) (No. 00-10499). The Fourth Circuit took the minority position in *United States* v. *Good*, 25 F.3d 218, 221 (1994), but held in *United States* v. *Pratt*, 239 F.3d 640, 646-648 (2001), that Section 3583 does not impose a cap on the period of supervised release under Section 841(b)(1)(C) and questioned the continuing validity of *Good*. The Ninth Circuit's decision in *Velasco-Heredia* is also inconsistent with its prior decision in *United States* v. *Garcia*, 112 F.3d 395, 398 (1997), and the government has sought rehearing en banc in *Velasco-Heredia* based, among other things, on that intra-circuit conflict. The better view is that, because Section 841(b) (1)(C) and Section 960(b)(3) require imposition of "at least 3 years" of supervised release, they have "otherwise provided" a supervised-release range within the meaning of Section 3583(b), and thus supersede the general maximum term specified in that statute. In any event, petitioner does not specifically challenge his term of supervised release, and this case therefore does not present the question on which the circuits are divided.

the en banc Tenth Circuit has since held that the omission of an element from the indictment is subject to harmless-error review. See *Prentiss*, 2001 WL 788648, at *9-*11. The Tenth Circuit has not addressed the relationship of *Jackson* and *Prentiss*.[9]

Petitioner also argues (Pet. 9-10) that the Fifth and Sixth Circuits, in applying the plain-error standard, have required resentencing whenever a defendant's sentence exceeds the statutory maximum provided for the offense without regard to drug quantity. That contention is not entirely consistent even with the cases petitioner cites to support it, which declined to grant relief for *Apprendi* errors where doing so would not change the defendant's overall sentence. See *United States* v. *Meshack*, 225 F.3d 556, 577-578 (5th Cir. 2000) (because defendant would remain subject to longer sentence on separate count, he could "show no meaningful benefit he would receive from vacating" a sentence imposed in violation of *Apprendi*), cert. denied, 121 S. Ct. 834, modified on reh'g, 244 F.3d 367 (5th Cir. 2001), petition for cert. pending (filed June 5, 2001) (No. 00-10499); *Page*, 232 F.3d at 544-545 (declining to vacate sentence imposed in violation of *Apprendi* where sentences on multiple counts could be run consecutively to achieve same overall sentence).[10] Moreover, the

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[9] In two cases involving the omission of a drug quantity allegation from the indictment, the Fifth Circuit recently held that the omission was a "jurisdictional" error that required resentencing. *United States* v. *Longoria*, No. 00-50405, 2001 WL 815609 (July 19, 2001); *United States* v. *Gonzalez*, No. 00-50406, WL 815606 (July 19, 2001). The government is considering whether to seek rehearing in those cases.

[10] Petitioner also relies on *United States* v. *Nordby*, 225 F.3d 1053, 1060-1061 & n.6 (9th Cir. 2000). The Ninth Circuit in that case merely acknowledged "two possible approaches" to the "sub-

Fifth Circuit, like other circuits, has declined to grant relief under the plain-error standard where, "[c]onsidering the evidence in the record and the evidence available to the government should the case be retried," it was "highly unlikely that a jury on retrial, properly instructed post-*Apprendi*, * * * would find drug quantities * * * different from the amounts attributed to each defendant" at the original sentencing. *United States* v. *Miranda*, 248 F.3d 434, 446 (5th Cir. 2001); accord *United States* v. *Green*, 246 F.3d 433, 437 (5th Cir. 2001); but see *United States* v. *Randle*, No. 97-20360, 2001 WL 811770, at *3 (5th Cir. July 17, 2001). And, while the Sixth Circuit has reversed without examining the strength of the government's evidence in some plain-error cases, see, *e.g.*, *United States* v. *Martinez*, 253 F.3d 251, 255-256 (2001), it has not fully explained the relationship of its various plain-error holdings. At least while those courts are working out the ramifications of plain-error analysis in the *Apprendi* context, review by this Court is not warranted.

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stantial rights" inquiry, one that asks whether the sentence imposed exceeds that authorized by the jury's verdict and one that asks whether the jury would have made the same drug-quantity determination as the judge. The *Nordby* court did not choose between the two approaches because it found that the defendant had borne his burden under both. Moreover, the choice of approach may not have any practical significance because, even if the Ninth Circuit adopts the approach that focuses solely on the length of the sentence for purposes of the "prejudice" prong, the second approach should still come into play when the court, following *Johnson*, 520 U.S. at 467, applies the fourth, discretionary component of the plain-error standard.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 2001